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No. 98-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,
Petitioner,

v.

MOTOROLA, INC.,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois for the First District

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Motorola, Incorporated hereby states that it has no parent corporation and two nonwholly owned subsidiaries that are publicly traded, Terosil, A.S. and Tesla Sezam, A.S.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Schiffner alleges that Respondent Motorola, Inc. did not adequately advise him and the public about supposed potential health risks associated with hand-held portable cellular telephones. But he does not allege injury to himself from cellular telephone use, nor does he contend that his phone malfunctioned. Rather, Schiffner claims that his phone was diminished in value by Motorola's inadequate warnings. His was the second of two nearly identical purported class actions

to be dismissed by the Illinois courts. The Illinois Supreme Court declined to review either case.

There is nothing about this case that warrants the Court's review. Schiffner's entire lawsuit was dismissed by the Circuit Court of Cook County, Illinois because, among other reasons, his claims are preempted by the Electronic Product Radiation Control Act (the "Act"), 21 U.S.C. § 360kk *et seq.* Late last year, the Illinois Appellate Court affirmed the Circuit Court's dismissal, holding that all of Schiffner's claims are preempted by the Act. *Schiffner v. Motorola, Inc.*, 297 Ill. App. 3d 1099, 697 N.E.2d 868 (1st Dist. 1998).

The Act was passed in 1968. In the three decades since, there have been only *two* reported decisions interpreting the express preemption provision in the Act — *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 622 N.E.2d 287 (1st Dist. 1997), and this case. Both decisions were issued by Illinois Appellate Courts in cases brought by the same plaintiffs' attorneys who represent Schiffner in this case. Both cases involved essentially identical warnings and labeling claims challenging the safety of cellular phones. In those two cases, two different panels of the Illinois Appellate Court independently concluded that plaintiffs' claims were preempted. In both cases, the plaintiffs sought review of the appellate decisions by the Illinois Supreme Court, and in both cases the Illinois Supreme Court declined to exercise its discretionary review. In *Verb*, plaintiffs chose not to file a petition for writ of certiorari with this Court.

This case is not worthy of review. It does not raise any important issue of federal law, as evidenced by the fact that there have only been two cases that have interpreted the Act during the last thirty years. Nor does the decision of the intermediate Illinois Appellate Court in this case conflict with any other decision that has interpreted the Act. To the contrary, the Appellate Court's decision in this case is fully consistent with, and reinforces, the *Verb* court's earlier holding. Finally, the Illinois Appellate Court's decision in this case was correct on the merits. The Illinois Appellate Court cited and followed

this Court's prior preemption precedent, and correctly applied the Court's teachings in its interpretation of the Act.

In short, Schiffner's petition for a writ of certiorari is baseless and should be denied. There is no reason for this Court to exercise its discretionary review in this case.

COUNTERSTATEMENT OF THE CASE

This case has its origins in another purported class action filed in the Circuit Court of Cook County, entitled *Verb v. Motorola, Inc.* In August 1993, the Circuit Court dismissed *Verb*. Unhappy with the Circuit Court's decision, Mr. Verb's lawyers did two things: (1) they followed the standard appellate course and appealed *Verb* to the Illinois Appellate Court, First District; and (2) they filed the same case over again on behalf of a different named class representative — Frank Schiffner. The First District subsequently affirmed the dismissal in *Verb*, holding, among other things, that allegations challenging the safety of cellular telephones are preempted by the Act. *See Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 672 N.E.2d 1287 (1996). The Illinois Supreme Court denied the *Verb* plaintiffs' petition for leave to appeal. 172 Ill. 2d 568, 679 N.E.2d 386 (1997).

Schiffner filed his Fourth Amended Complaint on March 24, 1997, alleging that Motorola manufactured, supplied, or sold portable cellular telephones without adequate warnings and product labels. (Cplt. ¶ 30) Each of Schiffner's four counts includes an allegation that Motorola did not adequately warn about supposed dangers associated with using cellular phones:

> Defendant failed to adequately advise plaintiff and the general public that (1) Defendant had not conducted tests to discern whether use of the cellular portable telephones posed any health risks to the users, and that (2) use of cellular portable telephones may be hazardous to the user's health.

(*Id.* ¶¶ 30, 44, 57) Similarly, each of Schiffner's claims includes an allegation that Motorola failed to label its products properly:

> Defendant also failed to adequately package and/or label the cellular portable telephones to apprise Plaintiff and the general public that (1) Defendant had not conducted tests to discern whether use of the cellular portable telephones posed any health risks to the users, and that (2) use of cellular portable telephones may be hazardous to the user's health.

(*Id.* ¶¶ 31, 44, 57) Schiffner also alleges that on February 4, 1993, Motorola misrepresented that cellular phones are safe when a company official "stated that cellular phones' safety is 'rooted in scientific fact' citing 'thousands of studies' taken over forty years." (*Id.* ¶ 20) This is the only affirmative misrepresentation alleged by Schiffner, and it occurred more than two years *after* he purchased his cellular phone.

Based on these allegations, Schiffner asserted four counts: breach of implied warranty of merchantability (Count I); violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS § 505/1, *et seq.* ("Consumer Fraud Act")(1993)(Count II); violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (1994)(Count III); and a claim for "injunctive relief" (Count IV). Schiffner pled no facts to show any actual, present compensable personal injury, and did not claim that the phone caused him any physical harm. Rather, Schiffner claims damages for a "reduction in the value of the cellular portable telephones" (Cplt. ¶ 43), and because he claims he "[has] not received the benefit of [his] bargain." (*Id.* ¶ 61)

On June 16, 1997, the Circuit Court dismissed Schiffner's Fourth Amended Complaint, ruling that Schiffner's claims were preempted by the Act, and failed to allege a compensable injury. App. 5. Schiffner appealed the dismissal. After briefing and oral argument, the Appellate Court affirmed, holding that the Act preempts Schiffner's claims. App. 1-17. The Appellate Court carefully analyzed the preemption issue in two parts.

First, the Appellate Court found that Schiffner's allegations and causes of action are "indistinguishable" from

Verb. *Id.* at 8. The Appellate Court concluded that, like *Verb*, Schiffner's claims "'centered on the lack of warnings as to the safety of and possible health risks caused by cellular telephones purchased by [him] which, the parties agree, emit radiation.'" *Id.* at 8-9 (quoting *Verb*, 284 Ill. App. 3d at 469, 672 N.E.2d at 1293).

Second, the Appellate Court thoroughly reviewed the applicable principles of federal preemption and applied them *de novo* to determine the Act's preemptive effect on claims challenging the safety of cellular phones.[1] App. 6. In doing so, the court carefully considered Schiffner's criticisms of the *Verb* opinion, holding that all of them were unfounded:

> On appeal, plaintiff essentially asserts that the *Verb* case was wrongly decided and that the *Verb* opinion failed to address plaintiff's arguments. We disagree. * * * * We find that the *Verb* decision was correctly decided and addressed the legal arguments now presented by plaintiff on the preemption issue. Accordingly, we affirm the dismissal of plaintiff's fourth amended complaint because the state claims are preempted by federal law.

Id. at 6, 14. The Appellate Court distinguished *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), because those cases involved different statutes: "Obviously different statutes, different preemption provisions and different regulations will be interpreted differently. . . . Furthermore, even the same statute can require differing results as to preemption given different underlying facts." App. 11-12.

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[1] Motorola argued below that the Appellate Court should follow *Verb* and affirm the Circuit Court's ruling under principles of *stare decisis*. The court disagreed, and instead elected to examine the dismissal of Schiffner's complaint, and *Verb*, *de novo*. App. 5-6. Thus, the Appellate Court took a fresh look at the preemption issue and concluded, independently, that the Act preempts warnings and labeling claims challenging the safety of cellular portable telephones.

After finding that all of Schiffner's claims were preempted, the Appellate Court went on in *dicta* to find that Schiffner had adequately alleged damages. *Id.* 17. The Appellate Court chose not to address Motorola's third ground for affirming the Circuit Court's decision, which was that each of Schiffner's four claims suffers from one or more independent pleading defects.

REASONS FOR DENYING THE WRIT

In his petition, Schiffner raises the exact issues that the Illinois Supreme Court has twice found not worthy of review — first in 1996 in *Verb*, and again last year in this case. Those issues are no more worthy of review in this Court, for at least four reasons.

First, the ruling in this case presents a very narrow issue because the ruling is, by its very nature, statute-specific. The Appellate Court made clear that its holding was limited to its analysis of the Act *as applied to* the facts alleged in Schiffner's complaint. App. 8-14. Moreover, there have been only *two* decisions in the thirty years since the Act was passed that have addressed its preemptive scope.

Second, the ruling below does not conflict with decisions of any other court. Schiffner suggests that the ruling here conflicts with various decisions that have interpreted supposedly similar preemption provisions in other statutes. Schiffner is wrong. Decisions interpreting preemption provisions in other statutes are irrelevant to the analysis here because, as this Court has held, the touchstone in any preemption analysis is the intent of Congress. *Lohr*, 518 U.S. at 485. Cases interpreting different statutes, with different legislative histories, different purposes, and different statutory frameworks, shed no light on the intent of Congress when it passed the Act at issue here. Indeed, in both *Verb* and this case the Appellate Court so held. App. 11-13; *Verb*, 284 Ill. App. 3d at 470, 672 N.E.2d at 1294. There is not a single reported decision that conflicts with the preemption holdings in *Verb* and in this case.

Third, Schiffner's petition does not merit review because there are independent state law grounds for affirming the ruling below. Each of Schiffner's four claims suffers from one or more substantive pleading defects under Illinois law. In light of its ruling that Schiffner's claims are preempted by federal law, the Appellate Court did not address these individual pleading flaws. Nevertheless, the fact remains that even if Schiffner's claims were not preempted (which they are), his lawsuit would still have to be dismissed because he has failed to plead a cognizable claim. Thus, review of the preemption issue would not change the ultimate result in this case.

Fourth, the ruling below was correct. Although mere error is no basis for this Court to exercise its discretionary review, the fact is that the ruling below rests on settled principles of preemption here, as in *Verb*. The Appellate Court thoroughly analyzed the language of the Act, the purpose of the statute, the statutory framework, and the nature of Schiffner's claims. It found that Schiffner's claims "centered on the lack of warnings as to the safety of and possible health risks caused by cellular phones." App. 8-9. And it correctly concluded that because the Act expressly granted the FDA the exclusive power to prescribe such warnings and performance standards for cellular phones, Schiffner's state law claims were preempted.

I. THE RULING BELOW INVOLVES NO ISSUES OF GENERAL IMPORTANCE THAT MERIT REVIEW.

Schiffner seeks review of an intermediate state appellate decision. The Court's Rules allow for such review when the petition presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Schiffner's petition presents no such issue. The Appellate Court's preemption ruling is by its nature statute-specific and limited to the facts of this case. As this Court has made clear, in analyzing the preemptive scope of a particular statute, courts must take as their touchstone the intent of Congress, as informed by the statutory language, the statutory framework, the legislative history, the purpose of the statute as a whole, and

"the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Lohr*, 518 U.S. at 485-86. Thus, the scope of every preemption decision is typically limited to the particulars of the statute at issue in the case.

The Appellate Court recognized this principle in its ruling below, emphasizing that the key to its preemption analysis is the language and framework of the Act:

> the key inquiry in all preemption cases is the objective or purpose of Congress in enacting the *particular statute*. The doctrine requires courts to examine *the Federal statute in question* to determine whether Congress intended it to supplant State laws on the same subject.

App. 11 (emphasis added in original) (quoting *Verb*, 284 Ill. App. 3d at 467-68, 672 N.E.2d at 1292). As discussed above, the Appellate Court expressly acknowledged the limited application of its holding, noting that courts will interpret different statutes and regulations differently, and that under different facts the same statute may have a different preemptive effect. App. 11-12. Thus, the ruling below is not one that, as a legal or practical matter, will have widespread application.

Schiffner argues that the decision below "will create a morass of inconsistent rulings interpreting the same statutory language." Pet. 6. Not so. First, as the Appellate Court noted, aside from *Verb* there is no other reported decision in the country interpreting or applying the preemption provision in the Act. App. 5. And there has not been a single reported case that has relied on or even cited the Appellate Court's preemption rulings in either *Verb* or *Schiffner*. In short, these rulings are narrow in scope, and there is no need for the Court to grant review here.

II. THE RULING BELOW DOES NOT CONFLICT WITH ANY OTHER DECISIONS.

The Court's Rules also allow for review when the ruling below has decided "an important federal question that in a way that conflicts with" other decisions by lower courts of last resort or "relevant decisions of this Court." Sup. Ct. R. 10(b) & (c). Neither is true in this case.

The ruling below does not conflict with any other decision, let alone a decision of this Court. The only other case that has been decided on this issue anywhere in the country is *Verb*, and it reached the same result for essentially the same reasons. No court has ruled that the Act does *not* preempt the claims asserted here. Because no conflict exists, the Court should deny Schiffner's petition. If in the future any court were to disagree with the Appellate Court's sensible conclusion that the Act preempts claims such as those raised by Schiffner in this case, that ruling would provide an appropriate opportunity to consider whether to address these issues on the merits. But no such justification exists at this time.

Schiffner tries to manufacture a conflict between the ruling below and decisions that have interpreted the preemptive effect of several other federal statutes, including the Federal Noise Control Act, 42 U.S.C. §§ 4901-4918 (1994) ("FNCA"), the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30169 (1994) ("FMVA"), and the Medical Device Amendments, 21 U.S.C. § 360(k)(a) (1994) ("MDA"). *See* Pet. 6-13. He argues that because those statutes supposedly have "similar" preemption provisions, cases holding that those statutes do not preempt certain state law claims conflict with the Appellate Court's decision here. *Id.* at 6. Schiffner's asserted conflicts are illusory because the cited decisions analyzed different statutes, which have different purposes, different statutory structures, and different legislative histories, and which have been implemented by vastly different federal regulatory schemes. *See, e.g., Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973) ("Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of

the federal regulatory scheme in question."). They thus are not dispositive of, or even particularly relevant to, the preemption issues raised in this case under the Act.[2]

III. IN ANY EVENT, INDEPENDENT STATE GROUNDS EXIST FOR AFFIRMING THE RULING BELOW.

Even if the ruling below raised an issue of general importance or a decisional conflict (and it does neither), Schiffner's petition is still unworthy of review because there are other substantive defects in his complaint that defeat his claims. When an independent basis for a decision exists, particularly one that rests on grounds of state law, the Court's discretionary review is not warranted. *See, e.g.*, R. Stern, *et. al.*, *Supreme Court Practice* § 4.12, at 185 (7th ed. 1993) (citing cases for the proposition that the Court will not grant certiorari in cases in which other issues exist that "might alone have served as an adequate ground for disposition of the case").

Each of Schiffner's claims is separately flawed. Schiffner's implied warranty claim (Count I) fails for two reasons: (1) he does not allege he is in privity of contract with Motorola, as required under Section 2-314 of the UCC, *see Board of Educ. v. A. C. & S., Inc.*, 131 Ill. 2d 428, 461, 546 N.E.2d 580, 595 (1989); and (2) he has failed to allege a

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[2] For example, in *Baltimore & Ohio R.R. v. Oberly*, 837 F.2d 108, 113 (3d Cir. 1988), cited by Schiffner (Pet. 11), the court based its preemption ruling on a provision in the FNCA that "primary responsibility for control of noise rests with State and local governments." 42 U.S.C. § 4901(a)(3). No such language exists anywhere in the Act. Similarly, in *Lohr*, 518 U.S. 470, also cited by Schiffner (Pet. 11), the Court based its preemption ruling primarily on FDA regulations interpreting the MDA, which provide that state requirements are preempted "only" when the FDA has established "'specific counterpart regulations or . . . other specific requirements applicable to a particular device.'" *Id.* at 498. No FDA regulations interpreting the Act contain any "specificity" requirements like those promulgated for the MDA. To the contrary, the Act's preemption provision prohibits states from enforcing "*any* standard which is applicable to the same aspect of performance" regulated by the FDA. 21 U.S.C. § 360ss (emphasis added).

product defect. His defect allegations are premised entirely on the theory that cellular phones might hypothetically cause injury or an increased risk of injury.[3] Such speculative defect allegations fail to state a claim under Illinois law. *Verb*, 284 Ill. App. 3d at 472, 672 N.E.2d at 1295. Schiffner's Consumer Fraud Act claim (Count II) is defective because the only alleged misrepresentation Schiffner attributes to Motorola occurred on February 4, 1993 (Cplt. ¶ 20), nearly two-and-a-half years *after* Schiffner purchased his phone. (*Id.* ¶ 11) The Illinois Supreme Court has held that only pre-purchase misrepresentations state a claim under the Consumer Fraud Act. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 502, 675 N.E.2d 584, 594 (1996); *see also Verb*, 284 Ill. App. 3d at 471-72, 672 N.E.2d at 1295-96.

Schiffner's Magnuson-Moss claim (Count III) is derivative of his claims based on breach of the implied warranty. Because, as explained above, Schiffner has not alleged a defect that breaches an implied warranty, his Magnuson-Moss claim fails as well. *See* 15 U.S.C. §§ 2301, 2310(d) (1994); *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1031-32 (N.D. Ind. 1981). Finally, Schiffner's claim for injunctive relief (Count IV) fails because he has not alleged any facts establishing that he has a lawful right to relief, that he has an inadequate legal remedy, or that he will suffer irreparable harm without an injunction. *See Illinois Pure Water Comm., Inc. v. Yoder*, 6 Ill. App. 3d 659, 662, 286 N.E.2d 155, 157 (5th Dist. 1972).[4]

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[3] Schiffner alleges that Motorola sold phones "without adequate guards to shield the user from the EMF radiation" and "without adequate design so as to increase the distance between the user's head and the antenna of the phone." (Cplt. ¶ 39b, d) But Schiffner never alleges why guards or a new antenna design are necessary. He does not, and cannot, allege that EMF from cellular phones has caused injury in general, or to him personally, to warrant any modifications. Therefore, he has not properly alleged a product defect.

[4] Motorola also contends that Schiffner has failed to allege a compensable injury. The Appellate Court in *Verb* held that allegations about loss of value premised on cellular phones being "potentially harmful"

Because these pleading flaws are themselves dispositive under Illinois law, the Court is presented with several alternatives for affirming the rulings below dismissing Schiffner's complaint. The Court should thus deny the petition because its review of the preemption issue would not change the ultimate result in this case.

IV. THE COURT BELOW CORRECTLY HELD THAT SCHIFFNER'S CLAIMS ARE PREEMPTED.

Schiffner's petition is largely devoted to an argument that the Appellate Court erred. While such error does not itself provide an adequate basis for discretionary review, the simple fact is that the ruling below on preemption is correct.

A. Federal Preemption Standards

Federal preemption may be either express or implied and "'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Where, as here, a statute contains a preemption provision, the Court "need not go beyond that language to determine whether Congress intended [the statute] to pre-empt at least some state law." *Lohr*, 518 U.S. at 484.

Federal regulations have the same preemptive effect as federal statutes, *Fidelity*, 458 U.S. at 152-53, and a federal agency's affirmative decision *not* to regulate can have the same preemptive effect as a promulgated regulation, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). This Court has

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are pure speculation and conjecture, and do not state a claim under Illinois law. *Verb*, 284 Ill. App. 3d at 472, 672 N.E.2d at 1295. While the Appellate Court in *Schiffner* found that his allegations do state a claim, Motorola believes that the Illinois Supreme Court would follow *Verb* and dismiss Schiffner's claims for failure to allege a compensable injury. This presents yet another potential state law ground for affirming the decision below.

recently reaffirmed that damages actions brought under state common law, including state tort law, may be preempted to the extent they conflict with federal regulation. *Lohr*, 518 U.S. at 502-04.

B. Congress Gave The FDA Exclusive Authority Over Safety Regulations For Products That Emit Radiofrequency Energy, Such As Cellular Phones.

The Appellate Court held that Congress gave the FDA the exclusive power to regulate products that emit radiation, and thus "'it is irrelevant whether the FDA has not set any standards, as plaintiff[] allege[s], because the power to do so nonetheless resides with the FDA.'" App. 10 (quoting *Verb*, 284 Ill. App. 3d at 469, 672 N.E.2d at 1293). The statutory framework of the Act supports that conclusion. The Act imposes an affirmative obligation upon the FDA to determine what, if any, regulations or warnings are appropriate for products that emit radiation. Among other things, the FDA is required to:

- develop and administer performance standards for electronic products (21 U.S.C. § 360ii(a)(1));
- coordinate and conduct research and studies to minimize the exposure of persons to unnecessary electronic product radiation (*id* § 360ii(a)(2));
- coordinate with other federal and state agencies to gather information about electronic product radiation and to develop performance standards to control radiation emissions (*id.* § 360ii(a)(3) & (6)); and
- study and evaluate emissions of product radiation, and develop and test procedures and techniques to minimize exposure to electronic product radiation (*id.* § 360ii(a)(4) & (5)).

The Act's preemption clause prohibits a state from establishing any standard for an electronic product that "is not identical to the Federal Standard." *Id.* § 360ss. Taken together, these provisions confirm that Congress vested exclusive authority in the FDA to regulate products such as cellular phones.

Moreover, the FDA *has* exercised its authority to regulate cellular phones in two respects.

First, as noted above, the FDA is required by the Act (*id.* § 360ii(a)(3) & (6)) to coordinate with other federal agencies in the "development of performance standards pursuant to Section 360kk of [the Act] to control[] radiation emissions." *Id.* § 360ii(a)(6). The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370d (1994), requires federal agencies, such as the Federal Communications Commission, to evaluate the effects of their actions on the quality of the human environment. Pursuant to the NEPA, the FCC, in consultation with the FDA, has reviewed the need to regulate human exposure to RF radiation from FCC-regulated transmitters and facilities, including cellular phones. In 1985, the FCC adopted standards developed in 1982 by the American National Standards Institute and the Institute of Electrical and Electronics Engineers, Inc., which limit RF radiation exposure. *See* 47 C.F.R. §§ 1.1301-.1307 (1997). Thus, the FCC, in coordination with the FDA, has adopted regulations applicable to cellular phones. Because the statutory scheme expressly requires the FDA to work in coordination with other federal agencies, the FCC standards are tantamount to FDA standards for purposes of implementing the Act. Indeed, the FCC's updated regulations confirm this conclusion and expressly state that they represent an *official consensus* of the federal health and safety agencies, including the FDA, on radiofrequency exposure limits. *In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 61 Fed. Reg. 41006, 41007 (August 7, 1996).

Second, in response to the very issues that gave rise to this lawsuit, the FDA in 1993 again revisited the issue of human exposure to RF energy emitted by cellular phones. After reviewing the relevant scientific evidence, the FDA expressly concluded there was *no basis* for issuing any additional performance standards applicable to cellular phones beyond the standards put into effect by the FCC in 1985. As the FDA explained at that time:

> [B]ecause the phones emit radiofrequency energy, the agency could impose certain restrictions if health problems were to arise after marketing. For example, FDA could impose a performance standard on the manufacturers of these products if the scientific evidence showed a public health need. Such a standard might require that the phones emit radiofrequency energy below a certain level. *Existing scientific data do not justify FDA's taking this action.*

FDA Talk Paper No. 793, *Update on Cellular Phones* (Feb. 4, 1993) (emphasis added). This considered decision by the FDA not to issue any additional performance standards itself constitutes an affirmative regulatory action, especially because the Act *requires* the FDA to issue performance standards *if* it determines that such standards are necessary to protect the public health. 21 U.S.C. § 360ii(a)(1). Thus, Schiffner's suggestion that the FDA has failed to act on this issue is misleading at best. Pet. 8. The FCC has acted in conjunction with the FDA and other pertinent federal agencies, and this fact, taken together with the FDA's express conclusion that no further regulation is necessary, preempts Schiffner's claims. *See Ray*, 435 U.S. at 178 (depending on the precise statutory and regulatory scheme, an agency's decision not to regulate can have the same preemptive effect as an affirmative regulation). Thus, contrary to Schiffner's implication that the FDA has not addressed the issue, the broader context of federal regulation in this area supports the conclusion that his claims are preempted.

In its ruling below, the Appellate Court independently examined the Act's preemption provision, statutory framework, and legislative purpose, and then agreed with the *Verb* court that Congress vested exclusive authority in the FDA to establish standards of safety and warnings for cellular phones. It thus properly concluded that Schiffner's warnings and labeling claims are impliedly preempted.

C. Schiffner's Attacks On The Ruling Below Lack Merit.

Schiffner makes three complaints about the ruling below. First, he erroneously argues that the Act preempts his claims only if a specific standard issued by the FDA is in effect, citing *Myrick*, 514 U.S. 280. Pet. 6. He contends that because the language of the preemption provision in the statute at issue in *Myrick* is "similar" to the Act's preemption provision, *Myrick* should control here. Second, he argues that the Appellate Court erred by considering the general purpose of the Act rather than confining its analysis solely to the preemption provision. Third, he argues that the Act's savings clause preserves his claims. None of these arguments has merit.

1. *Myrick* Has No Relevance To This Case.

In *Myrick*, plaintiffs claimed that the defendants negligently failed to equip their trucks with anti-lock brake systems ("ABS"). The defendants argued that the FMVA preempted plaintiffs' claims because there was no federal standard requiring ABS in trucks. The Court held that there was no express preemption because there were no federal regulations in effect. Although the applicable federal agency — the National Highway Transportation Safety Administration — had originally issued regulations that required trucks to have ABS, a court had suspended the regulations. Thus, the lack of a standard for ABS "stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations," as opposed to an affirmative agency decision not to regulate. *Myrick*, 514 U.S. at 286-87. In addition, the Court reviewed the structure and purpose of the FMVA and held that Congress did not intend for NHTSA to have "all authority over the regulated area," and thus the FMVA did not impliedly preempt plaintiffs' claims. *Id.* at 286.

Schiffner's reliance on *Myrick* is misplaced for several reasons. As discussed above, *Myrick* involved a different statute (the FMVA) that has a different purpose, a different statutory framework, and a different legislative history from the

Act. And the Court applied the FMVA to a different set of substantive facts and allegations than are at issue here. Thus, the Court's decision in *Myrick* would be unlikely to have any direct relevance to the claims raised in this case, which involve no allegations of personal injury. Moreover, the distinctions that flow from different statutory and regulatory schemes gave rise to the two particular reasons why the Court in *Myrick* was able to distinguish earlier decisions like *Ray*, in which the Court had held that the governing federal agency's affirmative decision not to regulate would suffice to preempt any state regulation. First, the statute in *Myrick* was viewed as not being intended to centralize all such authority in NHTSA, 514 U.S. at 286, whereas here the Appellate Court determined that Congress intended "to relegate the authority to a federal agency to enact, where appropriate and approved, uniform national standards." App. 10 (citing *Ray* and distinguishing *Myrick*). Second, the lack of agency standards in *Myrick* resulted from the Ninth Circuit's suspension of previously issued regulations, *not* from an affirmative decision not to regulate. *See* 514 U.S. at 286-87. By contrast, the lack of FDA performance standards here results from the FDA's affirmative decision finding it unnecessary to supplement existing FCC regulation of cellular phones with additional measures of its own. *See supra* Section IVB (discussing regulatory background under the Act).

The FDA's affirmative decision not to adopt further regulations governing cellular phones preempts Schiffner's claims. *Ray*, 435 U.S. at 178. The Appellate Court was correct here to conclude that the preemption issues under the Act are controlled by *Ray* rather than *Myrick*, and in any event this reasonable determination does not merit review here.

2. The Appellate Court Properly Considered Congress' Purpose In Passing The Act.

Schiffner concedes, because he must, that it is a court's duty in every preemption analysis to determine the intent of Congress in passing the statute at issue. Pet. 9. Remarkably, however, Schiffner then takes the Appellate Court to task for doing just that and relying on the Act's "general purpose" clause in its preemption analysis. *Id.* at 13-14. This argument

is not only inconsistent, but is just plain wrong. This Court has repeatedly held that courts are obligated to consider not just a statute's preemption clause, but also the statute's "structure and purpose" as a whole. *Lohr*, 518 U.S. at 486. Thus, the Appellate Court's review of the Act's general purpose clause was entirely appropriate.

3. The Savings Clause In The Act Does Not Preserve Schiffner's Claims.

Schiffner's attempt to salvage his claims by pointing to the Act's so-called "savings" clause is futile. Such provisions "may not . . . preserve a state law or regulation which conflicts with the objective of a federal law, even if it is possible to comply with both." *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1582 (M.D. Ga. 1991). Thus, a general savings clause for claims asserted under state common law and statutory law does not "purport to preclude pre-emption of state law by other provisions of the Act." *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause") (citation omitted).

The Act's savings clause expressly states that it is *not* applicable if an action is preempted under the preemption provision contained in Section 360ss. 21 U.S.C. § 360pp(e) ("Except as provided in the first sentence of Section 360ss of this title . . . ."). Because Schiffner's claims would conflict with the FDA's affirmative regulatory decisions — made both within its exclusive statutory authority and in coordination with other federal agencies as provided by the Act — about how much federal regulation to provide on human exposure to RF radiation from cellular phones, they are not preserved by the savings clause. *See, e.g., Ouellette*, 479 U.S. at 493.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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